No. 88-1080 (3)

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1988

JIMMY SWAGGART, FRANCES SWAGGART, JIMMY SWAGGART MINISTRIES, INC., WILLIAM D. TREEBY, THE FIRST ASSEMBLY OF GOD CHURCH OF NEW ORLEANS, LOUISIANA, INC., LOUISIANA DISTRICT COUNCIL OF THE ASSEMBLIES OF GOD, INC., THE GENERAL COUNCIL OF THE ASSEMBLIES OF GOD, LAKEVIEW CHRISTIAN CENTER, CANAL ST. ASSEMBLY OF GOD, INC., MICHAEL INDEST, TOM MILLER, CECIL JANWAY, G. RAYMOND CARLSON, WALDO RISNER, ALLAN MCDONNEL and FORREST HALL

VERSUS

DAVID V. ADLER, TRUSTEE IN BANKRUPTCY, IN THE MATTER OF MARVIN E. GORMAN AND VIRGINIA A. GORMAN, NO. 04024-K, AND IN THE MATTER OF MARVIN GORMAN MINISTRIES, INC. FORMERLY WHO CARES MINISTRIES, INC. NO. 04025-K.

**On Petition For Writ Of Certiorari To The Supreme Court For The State Of Louisiana**

## REPLY BRIEF SUBMITTED ON BEHALF OF JIMMY SWAGGART AND JIMMY SWAGGART MINISTRIES

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## REPLY BRIEF SUBMITTED ON BEHALF OF JIMMY SWAGGART AND JIMMY SWAGGART MINISTRIES

The Petitioners' Brief in Support of the Petition for a Writ of Certiorari demonstrates that the decision by the Fourth Circuit Court of Appeals for the State of Louisiana ("lower court") to reverse the district court's dismissal of this case was improper for several reasons. The decision of the lower court impermissibly interferes with the doctrine of the Assemblies of God ("AG"), contradicts the precedent set by this Court and by a federal appellate court and needlessly jeopardizes the privacy rights of third parties. Respondents have not successfully refuted any of these arguments.

Petitioners, Jimmy Swaggart and Jimmy Swaggart Ministries, respectfully submit this Brief in reply to the two arguments that were made in the Respondents' Brief in Opposition to the Petition for Certiorari ("Opposition Brief"). First, this Brief will demonstrate that respondents' attempt to characterize this suit as a secular matter is misguided. Second, this Brief will demonstrate that the Motion for Contempt and/or Sanctions ("Contempt Motion") is wholly irrelevant to the proceeding in this Court. Respondents' objections to the granting of the writ of certiorari are meritless. This Court should grant the writ to review the serious threat to petitioners' First Amendment rights that this suit represents.

### ARGUMENT

#### A. Respondents' Attempts to Characterize This Lawsuit As A Secular Matter Are Misguided.

Respondents contend that this suit is a secular matter in order to bring it within the jurisdiction of civil courts.

They attempt to remove this dispute from an ecclesiastical setting by arguing that Gorman is not appealing his *dismissal* from the AG Church. They also argue that certain testimony allegedly taken from Rev. Swaggart's deposition demonstrates that his actions were not scripturally based. Finally, they argue that petitioners' actions are not protected by the First Amendment even if those actions were taken in furtherance of church doctrine. Each of these arguments is misguided.

Respondents' argument that this matter falls outside of the ecclesiastical setting because Gorman is not disputing his *dismissal* from the AG Church misses the point. Petitioners' recognize that Gorman is not disputing his dismissal; Gorman is, however, bitterly disputing *the disciplinary process* that was followed in connection with his dismissal. That entire *disciplinary process* is protected by the First Amendment, not just that portion of the process that resulted in his dismissal. Because the actions allegedly taken by petitioners all related to *that process*, those actions are beyond the review of the civil courts. Therefore, this court should grant a writ of certiorari to review the lower court's decision which permits this controversy to be tried in state court.

Respondents efforts to distinguish the cases cited by petitioners are equally misplaced. Respondents argue that *Hutchinson v. Thomas*, 789 F.2d 392 (6th Cir.), *cert. denied*, 479 U.S. 885, 107 S.Ct. 277, 93 L.Ed.2d 253 (1986) is inapposite to this lawsuit because the *Hutchinson* plaintiff challenged his *dismissal* and Gorman does not. This mischaracterization of the *Hutchinson* plaintiff's claim fails to consider that he also sued his church hierarchy and elders for damages arising from the defamation and intentional infliction of emotional distress in which he

claims the elders engaged *during* the dismissal process. *Id.* at 393. The *Hutchinson* court upheld the dismissal of this claim on jurisdictional grounds in spite of the fact that the plaintiff challenged not only his dismissal, but also claimed he had been defamed and otherwise harmed by the tortious conduct of the church elders. Because this is the exact conduct about which Gorman complains, the *Hutchinson* decision is entirely applicable to this case.

Respondents' argument that testimony allegedly taken from Rev. Swaggart's deposition[1] demonstrates that this controversy is secular in nature is also unfounded. In that argument, respondents allege that Jimmy Swaggart testified in his deposition that Genesis 9 provided guidance regarding the proper action to be taken when one is confronted with the sin of a brother. According to respondents, this contradicts the statements made by Rev. Swaggart's attorneys and other defense counsel that the AG disciplinary process was based, in part, on Matthew 18. Therefore, according to the respondents, the actions taken by defendants were not based on scripture and civil courts do have jurisdiction over this claim.

The very fact that the respondents are asking this Court to compare Matthew 18 with Genesis 9 demonstrates that this controversy does not belong in the civil courts. Even if civil courts were qualified to examine

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[1] Petitioners object to the mischaracterization of Rev. Swaggart's testimony in Respondents' Opposition Brief and their Contempt Motion. However, as the dissemination of deposition testimony is governed by the protective order issued by the district court on June 8, 1987, petitioners will not correct those mischaracterizations in this Brief. See *infra*, p. 6, n.1.

these two passages from scripture and to determine which provided the basis for Rev. Swaggart's alleged actions, those courts would be constitutionally prohibited from doing so. Instead of proving that this case is secular in nature, respondents' mischaracterization of Rev. Swaggart's testimony demonstrates that this case is an ecclesiastical matter over which civil courts cannot constitutionally exercise subject matter jurisdiction.

Respondents also argue "that even if defendants acted in furtherance of their religious belief, . . . the same is not protected by the United States Constitution nor [sic] the Louisiana Constitution." Opposition Brief, p. 7. According to respondents, the fact that "an individual cannot batter or kill another with immunity from prosecution believing his/her actions to be a religious obligation" means that an individual also cannot follow the church disciplinary process with impunity if that process requires church leaders to make certain statements viewed to be defamatory by the one being disciplined. Respondents cite *Reynolds v. United States*, 98 U.S. 244 (1879) to support their argument.

The *Reynolds* case does not control the case at bar. In *Reynolds*, this Court held that the First Amendment did not protect a Mormon from prosecution under criminal laws proscribing polygamy on the ground that polygamy was required by the Mormon religion. The Court traced the fact that polygamy had "always been odious among the Northern and Western nations of Europe", 98 U.S. at 250; and that "from the earliest history of England polygamy has been treated as an offense *against society*." *Id.* (Emphasis added). The Court then traced the history of this nation and concluded:

> "[T]here never has been a time in any State of the Union when polygamy has not been an offense *against society*, cognizable by the civil courts and punishable with more or less severity. *In the face of all this evidence, it is impossible to believe that the constitutional guarantee of religious freedom was intended to prohibit legislation in respect to this most important feature of social life.*"

*Id.*

The conduct about which respondents complain does not constitute an offense against society that interferes with a "most important feature of social life." Instead, the conduct about which they complain affects them and them alone. Although the state may have a legitimate interest in regulating allegedly tortious conduct of its citizens, the state interest advanced by regulating defamation claims cannot be said to rise to a level of the highest order. Since "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion," *Wisconsin v. Yoder*, 406 U.S. 205, 216, 92 S. Ct. 1526, 1533, 32 L.Ed.2d 15, 25 (1972), this Court should grant a writ of certiorari to insure that petitioners' First Amendment rights are properly protected in this instance.

**B. Respondents' Motion for Contempt and/or Sanctions Is Wholly Irrelevant To The Proceeding In This Court.**

Throughout their Opposition Brief, respondents refer this Court to the arguments made in the Contempt Motion which was filed in the Louisiana district court on January 10, 1989, sixteen months after the first exceptions were filed in this proceeding. In their Contempt Motion,

plaintiffs argue that defendants should be held in contempt or sanctioned for such grievous tactics as filing exceptions, moving the court for a protective order,[2] and objecting to discovery requests. Respondents rely on this motion to support several arguments in their Brief, including the following: (1) that "plaintiffs are not seeking civil review of an ecclesiastical matter", Opposition Brief, p. 4; (2) that "the 'Universal Church' Argument is Fictitious," *id.* at p. 6; (3) that the petitioners applied for the protective order in bad faith, *id.* at p. 9; (4) and that Rule 11 sanctions should be granted by this Court against the defendants. *Id.* at pp. 9-10.

Respondents' reliance on their Contempt Motion is inappropriate for several reasons. First, the Contempt

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[2] On June 8, 1987, the district court granted a protective order which protected from disclosure to the public and the press certain information gained through discovery. The protective order is reprinted at page 2 of the Appendix to this Reply Brief. At a later date, a second protective order was entered to provide for the taking of video depositions and for the sealing of the video tapes in the court record after the deposition is taken. That protective order is reprinted at page 6 of the Appendix to this Reply Brief. Although neither of these orders has any bearing on the merits of this writ application, the terms of the June 8, 1987 protective order call into question the propriety of respondents' disclosure in the public record of testimony allegedly taken in discovery depositions. Because the protective order prohibits such disclosure unless the procedure outlined in the protective order is followed (which procedure was not followed in this instance), the disclosure of that testimony violates the order. Moreover, since the depositions were taken long after the exceptions in this case were filed, the mischaracterization of that testimony in the Contempt Motion cannot properly be considered by this Court.

Motion was not a part of the record on the appeal of the exception of lack of subject matter jurisdiction. The Contempt Motion was filed on January 10, 1989. The exception was filed and sustained in 1987. Anything that occurred in this litigation after that time is not properly considered by this Court.

Second, the Contempt Motion is set for hearing in the district court on April 15, 1989. Any action taken by this Court before the record is developed in the Court below would be premature.

Third, any request for sanctions in this Court is totally unwarranted because the authority on which petitioners rely is not applicable to this Court. Rule 11 of the Federal Rules of Civil Procedure applies only to proceedings in United States district courts, not to proceedings filed in this Court. Rule 1, Fed. Rules of Civ. Pro. Therefore, this Court should not consider granting sanctions pursuant to this rule on any grounds, and especially not on the utterly spurious grounds outlined in the Contempt Motion.

Respondents' argument that their Contempt Motion refutes petitioners' argument that the Universal Church encompasses the church of all Christians is also totally unfounded. First, the Motion for Contempt does not address the Universal Church argument at all; second, even the respondents' mischaracterizations of Rev. Swaggart's testimony in the Contempt Motion do not address that subject; and third, contrary to respondents' implications, the Universal Church "argument" was not invented by the defendants in this case, but is based on a published fundamental truth of the AG church. Petitioners'

Brief in Support, App. 153, AG Constitution, Statement of Fundamental Truths. By referring *only* to the Contempt Motion to refute petitioners' reliance on the Universal Church concept, respondents have demonstrated that they have no arguments to refute that concept at all.

Respondents' Motion for Contempt has no bearing on this writ application. Moreover, Rule 11 of the Federal Rules of Civil Procedure has no bearing on this Court. Therefore, this Court should ignore respondents' references to its Contempt Motion and their request that Rule 11 sanctions be granted in this Court.

## CONCLUSION

Respondents arguments that this matter is secular in nature and therefore within the jurisdiction of this court are misguided and incorrect. Petitioners have demonstrated the threat to their constitutional rights posed by this case. Conversely, respondents have demonstrated no valid reason why civil courts should exercise jurisdiction over this claim. Accordingly, this Court should grant a writ of certiorari to prevent the serious incursion on

petitioners' civil rights that will occur if this case proceeds to trial in a court of improper jurisdiction.

Respectfully submitted,

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CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 87-5289 DIVISION "K"

MARVIN GORMAN, ET AL

VERSUS

JIMMY SWAGGART, ET AL

*JUDGMENT*

This matter came for hearing on Exceptions filed by several defendants and a Motion for Protective Order filed herein on behalf of defendants, Jimmy Swaggart, Jimmy Swaggart Ministries, Inc. and William D. Treeby:

After considering the pleadings, the argument of Counsel and the law:

IT IS ORDERED, ADJUDGED AND DECREED that the Exceptions of No Right or Cause of Action filed herein on behalf defendants, Michael Indest, Lakeview Christian Center, Jimmy Swaggart, Jimmy Swaggart Ministries, Inc., William D. Treeby, Don Brankel, Cecil Janway, Louisiana District Council of the Assemblies of God, Inc., The First Assembly of God Church, Inc., Waldo Risner, Allen McDonnell, Tom Miller, Canal Street Assembly of God, Inc. to the Petition filed herein on behalf of Marvin Gorman Ministries, Inc. be, and the same are hereby maintained and therefore the Petition filed herein on behalf of Marvin Gorman Ministries, Inc. is hereby dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Exceptions of Lack of Subject Matter Jurisdiction filed herein on behalf The General Council of

the Assemblies of God, Michael Indest and Lakeview Christian Center be, and the same are hereby maintained and therefore these proceedings are hereby dismissed as to those defendants.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all other Exceptions urged by defendants Jimmy Swaggart, Jimmy Swaggart Ministries Inc., William D. Treeby, Don Brankel, Cecil Janway, Louisiana District Council of the Assemblies of God, Inc., The First Assembly of God Church, Inc., Waldo Risner, Allen McDonnell, Tom Miller, Canal Street Assembly of God, Inc. be, and the same are hereby overruled. Defendants herein have fifteen days within which to file responsive pleadings.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a Protective Order Issue herein and therefore;

IT IS ORDERED that:

1. All discovery requests, including deposition notices of non-party witnesses, document requests, interrogatories, and other applications for discovery and/or responses thereto and contents thereof, shall not be filed in the record except as authorized herein and shall be furnished only to attorneys of record, parties and the persons to whom the respective discovery requests are directed unless further distribution is authorized by subsequent order of this Court. The Clerk of Court, upon presentation of a signed deposition notice not filed in the record, shall issue a deposition subpoena to the party requesting same; the party requesting issuance of the deposition subpoena is hereby authorized to and shall

employ a private person, not a party to these proceedings, to serve the deposition subpoena; and after service of the deposition subpoena is made, the party shall retain the return of service in its possession and shall not file the return of service into the record except as authorized in this order;

2. Any documents produced in discovery in connection with this case shall be stamped "Confidential; Subject to Protective Order entered in Civil Action No. 87-5289, Civil District Court for the Parish of Orleans" and shall be numbered sequentially by the party producing same with a suitable prefix to denote its orgin [sic];

3. Depositions in this proceeding shall be closed with attendance limited to court reporters, parties, attorneys of record, witnesses and attorneys of the witnesses;

4. Subject to the provisions of paragraph 5, depositions and deposition exhibits shall be sealed and all copies retained by parties and their attorneys, or by witnesses and their attorneys, and shall be used solely in connection with this litigation and shall not be distributed or publicized except as authorized in this order;

5. In the event that any pleadings or documents utilizing or arising from pretrial discovery (including but not limited to depositions and deposition exhibits, exhibits and answers to interrogatories, and motions to compel discovery) (hereinafter collectively referred to as "Filed Materials") are to be filed in this proceedings by any party:

(a) Such Filed Materials will be distributed to and received by all counsel of record at least seven days

prior to the date of filing, along with notification that the distributing party intends to file the Filed Materials on a specified date;

(b) Any party to the proceeding shall then be entitled to file a motion to seal the Filed Materials and/or to close any hearing that may be held on the Filed Materials. Pending the determination on the motion to seal and/or to close the hearing on the Filed Materials, the Filed Materials shall be filed under seal. The temporary filing of the Filed Materials under seal shall not alter the burden of justifying the sealing or closure as provided for by applicable law;

(c) In the event that any party files a motion to seal Filed Materials or to close a hearing on Filed Materials or any other hearing, that party shall notice such motion for hearing and serve all counsel of record and the attorney for the intervenors, who will be provided with reasonable advance notice of the hearing and shall be afforded an opportunity to appear and oppose the motion to seal the Filed Materials and/or close the hearing on the Filed Materials or any other hearing;

(d) In the event that any party files a motion to seal Filed Materials or to close a hearing on Filed Materials or any other hearing, that party shall do so in accordance with the order of this Court dated May 15, 1987.

6. Each of the parties, their attorneys, agents and representatives, shall make no use of and shall not disseminate, distribute or publicize the documents or information described in paragraphs 1-5 that are gained through discovery, other than such use as is necessary in

order for the discovering party to prepare and try the case, and other than such disclosure as may occur in the public record or in public proceedings in this matter in conformity with this order. Unless disclosed in the public record or public proceedings in this matter in conformity with this order, information gained by a party through the discovery process may not be published by any of the parties or made available to any news media for publication or dissemination. This protective order has no application except to information gained by the parties through the use of the discovery process. The restrictions in this paragraph do not apply to Intervenors, their attorneys, agents and representatives.

JUDGMENT READ, RENDERED AND SIGNED this 8th day of June, 1987 at New Orleans, Louisiana.

/s/ Richard J. Ganucheau
JUDGE

CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 87-5289 DIVISION "K"

MARVIN GORMAN, ET AL

VERSUS

JIMMY SWAGGART, ET AL

*CONSENT ORDER*
(Filed July 23, 1987)

Appearances - Phillip A. Wittmann
Denise M. Pilie'
Deborah Cunningham Forshee for Jimmy Swaggart, Jimmy Swaggart Ministries, Inc., William D. Treeby and Don Brankel

James C. Murphy, Jr. for
Cecil Janway and the Louisiana District Council for the Assemblies of God, Inc.

Quentin Urquhart for
Waldo Risner and First Assembly of God Church of New Orleans

Lawrence Mann for
Tom Miller and Canal Street Assembly of God, Inc.

David Bourgeois for
Allan McDonnel

Thomas D. Frasier
Hunter W. Lundy for
Marvin Gorman and Marvin Gorman Ministries, Inc.

*ORDER*

This matter came for hearing on Motions to Recall the Order Permitting the use of Video Depositions filed

by Jimmy Swaggart, Jimmy Swaggart Ministries, Inc., William D. Treeby, Don Brankel, Cecil Janway and the Louisiana District Council of the Assemblies of God.

After considering the pleadings, the arguments of counsel, and the law:

IT IS ORDERED, ADJUDGED AND DECREED that the Motions to Recall the Order Permitting the use of Video Depositions are DENIED;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Order Permitting the Use of Video Depositions is hereby modified as follows:

1. For all video depositions taken pursuant to this Order, the party who notices the video deposition shall provide an original stenographic transcript of the deposition at his cost in addition to the video tape of the deposition. All costs incurred in video taping the deposition are to be borne by the party noticing the deposition;

2. After the video taping of the deposition has been completed, the tape shall be delivered by the video reporter to the clerk of court within twenty four (24) hours after the completion of the deposition, whereupon the clerk of court shall place the video tape under seal. It shall be the responsibility of the attorney noticing the deposition to insure delivery of the tape.

3. No copies shall be made of any video taped deposition except for good cause shown pursuant to an Order of this Court.

4. Access may be had to the video tapes for viewing by counsel for any interested party upon motion requesting same duly noticed for hearing in accordance with the Order of this Court dated May 15, 1987.

5. All other provisions of the Protective Order issued in this matter on June 8, 1987 shall remain in full force and effect.

New Orleans, Louisiana, this 24th day of July, 1987.

/s/ Richard J. Ganucheau
JUDGE

*CERTIFICATE*

I hereby certify that the attached Consent Order was served on Hunter Lundy by telecopy and on all defense counsel by hand on Tuesday, July 21, 1987. Counsel for all parties who made appearances at the hearing on Monday, July 20, 1987 approved the Consent Order.

/s/ Denise M. Pilie'
Denise M. Pilie'